

OCT 7 1977

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 76-1809

JOHN L. SCOTT, *Appellant*

VS.

JOHN D. BENN, JR.,
RICHARD A. BACAS, Trustee,
THEODORE L. GRAY, Trustee, *Appellees*

MOTION TO DISMISS APPEAL

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Counsel of Record for Appellees

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THEODORE L. GRAY, Trustee, *Appellees*

MOTION TO DISMISS APPEAL

INTRODUCTION

NOW COMES Appellees' Counsel and moves that the Appeal of John L. Scott be dismissed for the reasons set forth below.

I

FACTUAL STATEMENT

The Order of the Supreme Court of Virginia entered February 24, 1977, (p. 48—Appendix A, Appellant's Jurisdictional Statement), merely affirms the Order of the Circuit Court of Prince William County, Virginia, entered April 7, 1976 (Appendix D of Appellant's J.S.); and

Which Order made no reference to the question raised by Appellant in his Jurisdictional Statement; i.e., the Constitutionality of Section 55-59 (6) of the 1950 Virginia Code, as Amended (p. 6 of Appellant's J.S.)

This Order of April 7, 1976, accomplished the following:

1. Dissolved the Injunction entered April 23, 1975 (Appellant's Appendix C).

2. Permitted Appellant to transfer the \$40,000.00 Bond required by Order of April 23, 1975, to the \$80,000.00 Injunction Bond required in a companion case (Chancery No. 8756) then pending in the Circuit Court of Prince William County, Virginia; and

3. Denied Appellant's Motion to Reinstate and Enlarge the Injunction.

Appellant's Petition to the Supreme Court of Virginia presented only two (2) questions:

- I. Did the Court err in holding that Section 55-59 (6) of the Code of Virginia does not violate the due process requirements of Article I, Section II of the Constitution of the Commonwealth of Virginia and the Fourteenth Amendment of the Constitution of the United States of America.

- II. Did the Court err in requiring Petitioner-Appellant to post a Forty Thousand (\$40,000.) Dollar bond after finding a claim and cloud on the title which it was the duty of the Trustees to remove before proceeding to summary foreclosure proceedings.

Both of these questions relate to the Circuit Court Order of April 23, 1975 (Appellant's Appendix D) which was not a *Final Order*.

At this point, Counsel requests the indulgence of the Court to recite a brief history of this litigation.

On June 21, 1972, Appellant Scott contracted with Appellee Benn for the purchase of a 104 Acre tract of unimproved land in Prince William County, Virginia. This Contract provided for a substantial cash payment, the assumption of the unpaid balance of a prior deed of trust, and the securing of the unpaid balance of the purchase price by a second deed of trust.

Settlement was held on December 28, 1972, and Appellant Scott executed and delivered the deed of trust set forth in Appellant's Appendix E, (p. 62, et seq., of J.S.), as well as the Notes described therein (p. 66 of J.S.). Note No. 1 is still held by Appellee Benn, and Notes No. 2, 3 and 4 were endorsed to the real estate brokers involved in the transaction.

NOTE: This Deed of Trust contains no reference to any Statute.

Appellant Scott failed to pay the interest and curtail due December 28, 1974 on Note No. 1 (held by Appellee Benn), and also failed to pay the second half of 1974 real estate taxes on the property conveyed by the subject Deed of Trust.

At the request of Appellee Benn, and pursuant to the terms of the subject Deed of Trust, Appellees Bacas and Gray advertised the property for sale at public auction on April 10, 1975. Appellant Scott was duly notified of the sale, and written notice of the sale was mailed to the holders of said Notes Nos. 2, 3 and 4.

Appellant Scott petitioned the Circuit Court of Prince William County, Virginia, for an Injunction, on the grounds set forth in Paragraphs 1, 2 and 3 of

the Order entered April 23, 1975 (Appellant's Appendix C).

This matter was heard on April 2, 1975, and the Court denied the Injunction.

Appellant Scott then filed an Amended Petition for an Injunction, repeating the averments contained in the Petition heard April 2, and added the claim of Carl Lynn, Jr. and wife, to a portion of the property subject to the Deed of Trust.

An Injunction was granted on this later ground, Vide: Paragraphs 4, 5, 6, 7, 8, 9 and 10 of the Order entered April 23, 1975 (Appellant's Appendix C).

Nevertheless, Appellant Scott appealed to the Supreme Court of Virginia from the findings of the Circuit Court set forth in Paragraphs 1, 2 and 3 of the Order entered April 23, 1975 (Appellant's Appendix C).

This Petition for an Appeal was rejected by the Supreme Court of Virginia, on February 2, 1976, on the ground that the Order of April 23, 1975, was *not* a *Final Order*. See Appellees' Appendix 1.

Appellant Benn (Vendor of the subject land and holder of the above mentioned Note No. 1) obtained a Boundary Agreement from Carl Lynn, Jr., and which resolved the dispute upon which the Injunction of April 23, 1975, was issued; and

By Order entered March 23, 1976 (Appellees' Appendix 2), the above mentioned Injunction was dissolved; and the subject property was again advertised for sale pursuant to the terms of the subject Deed of Trust.

Meanwhile, on August 6, 1975, Appellant Scott had filed a Second Chancery Suite (Chancery No. 8756) in the Circuit Court of Prince William County, Virginia, asking that the sale of the land conveyed by the subject deed of trust (and other land involved in the transaction) be rescinded on the grounds of fraud and misrepresentation and that the above mentioned Notes and Deed of Trust be cancelled. All of the holders of the Notes secured by the subject Deed of Trust were made parties defendant to this Action.

On April 2, 1976, the Honorable Harry L. Carrico and A. Christian Compton, Justices of the Supreme Court of Virginia, enjoined the then pending foreclosure sale; a copy of this Injunction Order is attached hereto as Appellees' Appendix 3. This is the Injunction Order referred to in Paragraph 3 of the Order entered April 7, 1976 (Appellant's Appendix D).

This again came on to be heard on April 7, 1976, on Appellant Scott's Motion to Reinstate and Enlarge the Injunction and that the \$40,000.00 Bond posted in Chancery Cause 8370 be transferred to the \$80,000.00 Bond required for the injunction granted in Chancery Cause 8756. See Appellant's Appendix D.

Appellant then again appealed to the Supreme Court of Virginia on the grounds set forth in Items I and II above and by Order entered in the Supreme Court of Virginia on February 24, 1977, (Appellant's Appendix A) Appellant's Petition for Appeal was rejected.

Chancery Cause No. 8756 came on for trial in May, 1977, in the Circuit Court of Prince William County, Virginia, and by Final Decree entered May 13, 1977, this Cause was dismissed; see copy of Order attached as Appellees' Appendix 4.

Complainant Scott has filed a Petition for Appeal in this Cause (Chancery No. 8756) to the Supreme Court of Virginia.

II.

THE DEED OF TRUST AS USED IN VIRGINIA IS A CONTRACTUAL OBLIGATION AND IS NOT CREATED BY SECTION 55-59 OF THE CODE OF VIRGINIA

Counsel for Appellant Scott is correct in pointing out the distinction between the statutes which recognize and regulate extrajudicial mortgage foreclosure proceedings and those cases in which the extrajudicial foreclosure proceedings are the creature of statute. Commencing on Page 4 of Appellant's J.S., Section 55-59 of the Code of Virginia is quoted.

Counsel respectfully directs the Court's attention to the first paragraph, which reads as follows:

"Every deed of trust to secure debts or indemnify sureties, except so far as may be therein otherwise provided, shall be construed to impose and confer upon the parties thereto, and the beneficiaries thereunder, the following duties, rights and obligations in like manner as if the same were expressly provided for by such deed of trust, namely:

"(1) The deed shall be construed as given to secure the performance of each of the covenants entered into by the grantor as well as the payment of the primary obligation." (Emphasis Supplied).

The origin of the deed of trust appears to be lost in antiquity. It appears that the deed of trust as we know it is an outgrowth of a marriage of the laws governing Trusts and the law of Mortgages, both of which are developments of the common law and chancery of prac-

tice. The first statutory reference counsel has found is in the Virginia Code of 1849, Title 33, Chapter CXVII, (page 504). Section 5 reads as follows:

"A deed of trust to secure debts or indemnify sureties may be in the following form, or to the same effect: . . ."

Section 6 reads as follows:

"The trustee in any such deed, except so far as may be therein otherwise provided, shall whenever required by any creditor secured, . . ."

The Code of 1873, Title 33, Chapter CXIII, (page 892), Form of a Deed of Trust to Secure Debts, etc., Section 5 reads as follows:

"A deed of trust to secure debts or indemnify sureties may be in the following form, and to the same effect: . . ."

Section 6, Duties and Compensation of Trustee, in said Code reads as follows:

"The trustee in any such deed, except so far as may be therein otherwise provided, shall, whenever required by any creditor secured, . . ."

The Code of 1919, Section 5167, reads as follows:

"Every deed of trust to secure debts or indemnify sureties, except so far as may be therein otherwise provided, shall be construed to impose and confer upon the parties thereto, and the beneficiaries thereunder, the following duties, rights and obligations in like manner as if the same were expressly provided for by such deed of trust, namely:

"(1) The deed shall be construed as given to secure the performance of each of the covenants entered into by the grantor as well as the payment of the primary obligation."

Repeatedly, the language of the Deed of Trust, i.e., the contract between the parties, appears to control.

"Deed is sole source of his authority.—The trustee can only do with the trust property what the deed, either in express terms or by necessary implication, authorizes him to do. *Williams v. Jones*, 165 Va. 398, 182 S.E. 280 (1935).

"Section controlling unless otherwise provided.—The provisions of this section are controlling *when the deeds of trust do not otherwise provide. Colonial Inv. Co. v. Cherrydale Cement Block Co.*, 194 Va. 454, 73 S.E.2d 419 (1952)."

In *Bryant v. Jefferson Federal Savings and Loan Ass'n*, U.S. Ct. of Appeals, Dist. of Col. Circuit (1974), 509 Fed. 2d, 511 the Federal Court stated, et seq., as follows:

"(3) There is no significant governmental involvement in the mortgage foreclosure practices attacked here. The power of sale was created, not through governmental enactment, but by private consensual agreement. We recognized long ago that a deed of trust 'provides the remedies for its own enforcement.' *Spruill v. Ballard*, 61 App.D.C. 112, 58 F.2d 517, 519 (1932). The validity of such provisions has been continually upheld. In 1894, the Court of Appeals for the District of Columbia stated that 'as long as these contracts are entered into by permission of law, they must be respected and not interfered with, unless upon some well recognized principle of equity applicable alike to all contracts of the same general nature.' *Anderson v. White*, 2 App. D.C. 408, 417 (1894). That same Term, the Supreme Court held:

"There is nothing in the law of mortgages, nor in the law that covers what are sometimes designated as 'trust deeds in the nature of mortgages,'

which prevents the conferring by the grantor or mortgagor in such instrument of the power to sell the premises described therein upon default in payment of the debt secured by it, and, if the sale is conducted in accordance with the terms of the power, the title to the premises granted by way of security passes to the purchaser upon its consummation by a conveyance.

Fuentes v. Shevin, 407 U.S. 67 (1972), involved replevin cases pursuant to Florida and Pennsylvania Statutes.

Sniadach v. Family Finance Corp. 395 U.S. 337 (1969), was a statutory garnishment proceeding.

In neither of these cases did the action complained of depend on a contractual power granted to the creditor.

III.

APPELLANT NOT INJURED BY ATTEMPTED FORECLOSURES

Appellant Scott does not claim that the attempted foreclosures violated any of the terms of the Deed of Trust. His Petition for an Injunction admitted that the Notes were in default. As stated above, due notice was given to all of the holders of the Notes secured by such Deed of Trust; and no where in the several Petitions and Appeals filed in this matter (including the *J. S.* now before this Court), does Appellant Scott claim that he did not receive due notice of the sale.

In obtaining each of the injunctions granted in this matter, Appellant Scott relied upon the broad principles of equity and not on any statutory enactment.

The Statute complained of (Sec. 55-59) of the Virginia Code does not abrogate any of Appellant's rights reserved in the Deed of Trust.

Appellant Scott does not claim that there were any lien-holders or other parties junior in interest to the Deed of Trust, nor were there any; and

The lien of the first trust holders would not be affected by a foreclosure under the subject deed of trust which is a secondary lien on the property.

IV.

CONCLUSION

In the event that Section 55-59 of the Code of Virginia, or any sub-section thereof, is found to be in violation of the Constitution of the United States, counsel respectfully submits that the Appellant would be bound by the terms of his Contract; that is, the Deed of Trust set forth in Appendix E (page 62, et seq) of his J.S. This Deed of Trust provides for the method of advertisement and defines the duties of the trustee.

For the reasons set forth above, Appellees respectfully submit that this Appeal should be Dismissed, and that they be awarded their proper costs.

Respectfully submitted,

HENRY S. CLAY, JR., *Counsel for*
John D. Benn, Jr., Richard A.
Bacas, Trustee, and Theodore L.
Gray, Trustee, Appellees

HENRY S. CLAY, JR., Esq.
CLAY, KELLER & GRAY
6627 Backlick Road
Springfield, Virginia 22150

Certificate of Service

This is to certify that a copy of the foregoing Motion to Dismiss Appeal was mailed, postage prepaid, to Rose F. Thompson, Esq., Counsel for Appellant, c/o Law Office of John L. Scott, 6417 Loisdale Road, Springfield, Virginia 22150, this 7th day of October, 1977.

HENRY S. CLAY, JR.

APPENDIX

APPENDIX

APPELLEES' APPENDIX 1**VIRGINIA:**

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 2nd day of February, 1976.

The petition of John L. Scott for an appeal from an order entered by the Circuit Court of Prince William County on the 23rd day of April, 1975, in a certain chancery cause then therein depending, wherein the said petitioner was plaintiff and John D. Benn, Jr., and others were defendants, having been maturely considered and a transcript of the record of the order aforesaid seen and inspected, the court being of opinion that the order entered on April 23, 1975, is not a final nor appealable order as required by Code, § 8-462, doth reject said petition and refuse said appeal.

Record No 750948

A Copy,

Teste:

/s/ H. G. TURNER
Clerk

APPELLEES' APPENDIX 2

VIRGINIA

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

CHANCERY No. 8370

JOHN L. SCOTT, *Petitioner*

vs.

JOHN D. BENN, JR. and RICHARD A. BACAS and
THEODORE L. GRAY, TRUSTEES, *Defendants*

Order

THIS MATTER CAME ON TO BE HEARD ON the 5th day of March, 1976, on the Motion of RICHARD A. BACAS and THEODORE L. GRAY, TRUSTEES, to Dissolve the Injunction heretofore granted in the above styled cause by Order entered April 23, 1975; and

IT APPEARING that by a Boundary Agreement dated August 19, 1975, and recorded in Deed Book 799, at page 84, among the land records of Prince William County, Virginia, Carl S. Lynn, Jr. and Martha Lynn, his wife, have quit-claimed and released all of their right, title and claim to any land lying within the 104.3 acre tract formerly owned by the said John D. Benn, Jr. and which tract includes the 101 acre tract conveyed by the said John D. Benn, Jr. to Petitioner, John L. Scott, Trustee, and which also includes the approximate 66 acre tract which is described in and conveyed by the Deed of Trust in relation to which this action was brought;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Injunction entered in this Cause on April 23, 1975, be and the same is hereby Dissolved.

It is further ADJUDGED, ORDERED and DECREED this date that Petitioner's Motion to Reinstate and to Enlarge the

Injunction heretofore granted and subsequently dissolved in this cause is hereby denied. Counsel for Petitioner takes exception to the Court's ruling.

AND THIS ORDER IS FINAL.

/s/ LEWIS D. MORRIS
Judge

Entered this 23rd day of March, 1976.

WE ASK FOR THIS:

CLAY, KELLER & GRAY
6627 Backlick Road
Springfield, Virginia 22150By /s/ Henry S. Clay, Jr.
HENRY S. CLAY, JR., *Counsel for*
Richard A. Bacas and
Theodore L. Gray, Trustees

SEEN:

SCOTT, BLACKBURN & CLARY
P. O. Box 158
Springfield, Virginia 22150By _____
ROSE F. THOMPSON, *Counsel*
for John L. Scott

APPELLEES' APPENDIX 3

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

Chancery No. 8756

JOHN L. SCOTT, et al., *Petitioner*

v.

JOHN D. BENN, JR., et al., *Defendants***Injunction Order**

This matter came on for hearing on the 2nd day of April, 1976, upon the verified Petition of Petitioner for an Injunction; and also upon the pleadings and papers heretofore filed in this cause; and after hearing argument of counsel; and it appearing to the Court that in Chancery Cause 8756, Petitioner has alleged the illegality, and the nullity of the basic contracts between Petitioner and Defendant John D. Benn, Jr., and all Notes, Deeds of Trust and other obligations arising from said contracts; and it further appearing to the Court that in this Chancery Cause 8756 Petitioner alleges that the said contracts and all Notes, Deeds of Trust and other obligations arising from said contracts have their roots in fraud and misrepresentation alleged to have been perpetrated upon Petitioner and are nullities; and it further appearing to the Court that these issues must be resolved prior to any further foreclosure proceedings, nor can the issues raised in this Chancery Cause be resolved prior to said date; and it further appearing that irreparable harm may be caused Petitioner and to any third party who might buy at the proposed foreclosure sale; and it further appearing to the Court that an Injunction should issue for good cause shown; and, now, therefore, It is ADJUDGED, ORDERED and DECREED

1. That defendants John D. Benn, Jr., Shannon and Luchs Company; Jordan L. Pepper and Jordan L. Pepper Real Estate; Benn, Inc. and Gwendolyn Benn, alleged Noteholders, be, and they hereby are, enjoined from instructing, directing or requesting the Trustees under the deed of trust, described in the Petition for the Injunction, to proceed with the proper foreclosure scheduled for April 6, 1976; and any prior instructions, directions or requests to the said trustees to proceed with foreclosure are hereby rescinded; and said noteholders are ordered to forthwith instruct the trustees to cease all efforts to foreclose under the said deed of trust; and

2. The trustees, Richard A. Bacas and Theodore L. Gray, trustees under the alleged deed of trust securing the said Noteholders, be, and they hereby are, enjoined from proceeding with the proposed foreclosure sale.

3. This Order is effective from 3:00 o'clock on the 2nd day of April, 1976, and shall continue in full force and effect

(a) until the issues raised in Chancery Cause 8756 have been disposed of; and

(b) until a further Order of a court of competent jurisdiction shall be entered enlarging, dissolving, modifying or continuing this Injunction.

4. That this Order is conditioned upon Petitioner posting a Bond in the amount of \$80,000, with corporate surety to be approved by the Clerk, within thirty (30) days from the date hereof.

5. And this cause is continued.

ENTERED this 2nd day of April, 1976.

/s/ Harry L. Carrico
HARRY L. CARRICO, *Justice*

/s/ A. Christian Compton
A. CHRISTIAN COMPTON, *Justice*

I ASK FOR THIS:

/s/ John L. Scott
JOHN L. SCOTT

/s/ Rose F. Thompson
ROSE F. THOMPSON, *of Counsel*
SCOTT, BLACKBURN & CLARY
6417 Loisdale Road
P. O. Box 158
Springfield, Virginia 22150

SEEN AND EXPECTED TO:

/s/ Henry S. Clay, Jr.
HENRY S. CLAY, JR., Esquire
Attorney for John D. Benn, Jr.

FRANK D. SWART, Esquire
*Attorney for Jordan L. Pepper and
Jordan L. Pepper Real Estate*

CHARLES O. CAKE, Esquire
Attorney for Shannon & Luchs Company

WALTER L. STEPHENS, ESQUIRE
Attorney for Benn, Inc. and Gwendolyn Benn

APPELLEES' APPENDIX 4

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

IN CHANCERY No. 8756

JOHN L. SCOTT, et al, *Complainant*

VS.

JOHN D. BENN, JR., AND OTHERS, *Defendants*

Final Decree

THIS CAUSE came on to be heard this 13th day of May, 1977, upon the Bill of Complaint and Answers formerly filed and all proceedings formerly had herein; upon the appearance of all parties hereto both in proper person and by counsel; upon the empaneling of a jury to hear the issues out of Chancery framed; and upon testimony and other evidence taken in open Court;

AND UPON the conclusion of Complainant's evidence, the Court having ruled that Jordan L. Pepper was not the agent of the Defendant, JOHN D. BENN, JR.; but was the agent of Complainant in all matters relevant herein;

WHEREUPON, the issues being submitted to the jury on the 11th day of May, 1977, the jury after consideration thereof having reported to the Court that it was unable to reach a verdict and the Court having discharged the jury;

WHEREUPON, the Complainant moved the Court that another jury constituted as the previous one be empaneled to try the same issues out of chancery previously decreed, which Motion the Court denied, and to which ruling the Complainant excepted; the Court found as follows:

"Gentlemen, after mature consideration, I am of the opinion that the Court did not err in instructing the jury

as to the burden of proof on the two issues submitted to the jury, the issues out of chancery; and that, after careful consideration of all the evidence, I am of the opinion that even had the jury found a verdict for the Complainant, I would not have concurred because I feel that the Complaint in this case has not carried the burden of proof of showing by clear, cogent and convincing evidence that a fraud has been perpetrated in the inducement to purchase the property. . . . and therefore, I must dismiss the bill"

WHEREUPON, the Complainant prayed leave to file his Amended Bill of Complaint to aver in Paragraph (3) of the Amended Bill that Gwendolyn Benn misrepresented that Weaver Bros., Inc. had previously offered \$6,000.00 per acre for the 104 acre tract but that John D. Benn didn't like Weaver Bros. and would not deal with them; and that John L. Scott reasonably relied thereupon to his injury; to which ruling of the Court, Defendants, John D. Benn, Jr., Gwendolyn Benn and Benn, Inc. object, as the motion for leave to amend comes too late, and except.

IT IS, THEREFORE, ADJUDGED, ORDERED AND DECREED as follows:

1. That this cause be, and it hereby is, dismissed with prejudice, as to Defendants, JOHN D. BENN, JR., GWENDOLYN F. BENN and BENN, INC.; and a request prayed for by Complainant hereunder be, and hereby is denied.

2. That on motion of Complainant all claims against the Defendant, SHANNON & LUCHS COMPANY, be, and they are voluntarily non-suited.

3. That the Injunction heretofore awarded in this Cause against Defendant, JOHN D. BENN, JR., be, and the same hereby is, dissolved.

4. That the Clerk of the Circuit Court forward forthwith a certified copy hereof to each counsel of record.

ENTERED this 13th day of May, 1977.

/s/ Elliott Marshall
ELLIOTT MARSHALL, Judge

SEEN:

/s/ Henry S. Clay, Jr.
HENRY S. CLAY, JR.

/s/ F. Mather Archer
F. MATHER ARCHER
Attorneys for John D. Benn, Jr.

/s/ Frank L. Cowles, Jr.
FRANK L. COWLES, JR., *Attorney for*
Benn, Inc. & Gwendolyn F. Benn

/s/ Charles O. Cake
CHARLES O. CAKE, *Attorney for*
Shannon & Luchs Company

SEEN AND EXPECTED TO:

/s/ Rose F. Thompson
ROSE F. THOMPSON

/s/ Guy O. Farley
GUY O. FARLEY

/s/ Paul Ebert
PAUL EBERT
Attorneys for John L. Scott, Complainant